Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of	)	
	)	
Ameritech Operating Companies	)	
Tariff FCC No. 2	)	
Transmittal No. 1312	)	
	)	
Nevada Bell Telephone Companies	)	
Tariff No. 1	)	
Transmittal No. 20	)	
	)	WC Docket No. 02-319
Pacific Bell Telephone Company	)	
FCC Tariff No. 1	)	
Transmittal No. 77	)	
	)	
Southern New England Telephone Companies	)	
Tariff FCC No. 39	)	
Transmittal No. 772	)	
	)	
Southwestern Bell Telephone Company	)	
FCC Tariff No. 73	)	
Transmittal No. 2906	)	

REBUTTAL COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

Pursuant to the Commission's Order released October 10, 2002,[1] the United States Telecom Association (USTA)[2] respectfully submits its rebuttal comments to the oppositions filed on November 14, 2002 (the Oppositions), in the Direct Case of Ameritech Operating Companies, Nevada Bell Telephone Companies, Pacific Bell Telephone Company, Southern New England Telephone Companies, and Southwestern Bell Telephone Company (SBC). SBC filed its Direct Case with the Federal Communications Commission (the FCC or the Commission) on October 31, 2002 (Direct Case).[3] SBC filed tariff Transmittal Nos. 1312, 20, 77, 772, and 2906 to

[1] *In the Matter Ameritech Operating Companies, Nevada Bell Telephone Companies, Pacific Bell Telephone Company, Southern New England Telephone Company, and Southwestern Bell Telephone Company, Transmittal Nos. 1312, 20, 77, 772, and 2906, Tariffs FCC Nos. 2, 1, 1, 39, and 73, respectively,* WC Docket No. 02-319, Order, DA 02-2577 (rel. Oct. 10, 2002) (SBC Order).

[2] USTA is the nation's oldest trade association for the local exchange carrier industry. USTA's carrier members provide a full array of voice, data and video services over wireline and wireless networks.

[3] *See Ameritech Operating Companies, Nevada Bell Telephone Companies, Pacific Bell Telephone Company, Southern New England Telephone Company, and Southwestern Bell Telephone Company, Transmittal Nos. 1312, 20, 77, 772, and 2906, Tariffs FCC Nos. 2, 1, 1, 39, and 73, respectively,* (Oct. 31, 2002) (SBC Direct Case).

become effective August 17, 2002.[4] The FCC suspended SBC's tariff for five months, pending an investigation to determine whether the revised security deposit and advance payment provisions proposed in Transmittal Nos. 1312, 20, 77, 772, and 2906 are reasonable and not so vague as to permit SBC to discriminate unreasonably against its interstate access customers. USTA supports SBC's Direct Case because it believes that the provisions regarding security deposits and advance payments detailed in Transmittal Nos. 1312, 20, 77, 772, and 2906 are reasonable and just and should be implemented to ensure SBC's continued ability to serve its customers. USTA urges the Commission to grant SBC's request in Transmittal Nos. 1312, 20, 77, 772, and 2906.

DISCUSSION

The FCC must move quickly to develop guidelines allowing SBC and other incumbent local exchange carriers (ILECs) to protect themselves from financial turmoil in the telecommunications industry. USTA has advocated implementation of measures to ensure that the interests of all telecommunications carriers and their customers are fairly balanced.[5] USTA strongly urges the FCC and state regulators to allow companies such as SBC to take reasonable measures, such as those proposed by SBC in Transmittal Nos. 1312, 20, 77, 772, and 2906, in advance of any given interconnecting carrier's bankruptcy to assure that ILECs will receive payments for their services, either in the form of permitting tariff changes, allowing ILECs to require advance deposits from financially doubtful interconnecting carriers, or allowing advance billing and/or prepayment for anticipated services.[6]

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[4] *See* SBC Order at 2.

[5] *See In the Matter of Verizon Petition for Emergency Declaratory and Other Relief*, WC Docket No. 02-202, Comments of the United States Telecom Association (Aug. 15, 2002) (USTA Comments) at 8.

[6] USTA has advocated five other principles to balance the interests of ILECs and their customers. First, after an interconnecting carrier's bankruptcy petition, the FCC should defer to the bankruptcy law and rules, which require payment (or adequate assurances of payment) for post-petition services so as to preserve the abilities of the numerous supplier-carriers to continue to provide services. Second, in the event that supplier-carriers are unable to recover all debt owed them for services (either pre-petition or post-petition) in a bankruptcy proceeding of an

Under SBC's current tariff, SBC may require deposits from customers who have a proven history of late payments or who have not established credit. Under Transmittal Nos. 1312, 20, 77, 772, and 2906, SBC would be able to require additional security deposits or advance payments from customers if: (1) any debt securities of a customer or its parent are below investment grade, as defined by the Securities and Exchange Commission; (2) any debt securities of a customer or its parent are rated the lowest investment grade by a nationally recognized credit rating organization and are put on review by the rating organization for a possible downgrade; (3) the customer does not have outstanding securities rated by credit rating agencies, e.g., Standard and Poor's, and the customer is rated (a) "fair" or below in a composite credit appraisal published by Dun and Bradstreet, or (b) "high risk" in Paydex score as published by Dun and Bradstreet; (4) the customer or its parent informs SBC or publicly states that it is unable to pay its debts; or (5) the customer or its parent has commenced a voluntary receivership or bankruptcy proceedings or had one initiated against it.[7] "SBC may seek a deposit or prepayment from a customer with impaired creditworthiness only if the customer's most recent interstate access bills from 'SBC Telephone Companies' total (including any outstanding balances) $1 million dollars or more."[8] These tariff revisions would allow SBC the discretion to require a two-month deposit from a customer with a history of late payments or no established credit.[9] SBC also proposes provisions that would give a customer 15 or 10 days notice – rather than 30 days under

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interconnecting carrier, supplier-carriers should be allowed to recover this cost through some clear pricing mechanism provided by the FCC. Third, any such mechanism should also allow the recovery of unbundled network element charges defaulted on by a bankrupt interconnecting carrier. Fourth, the FCC should support the application, to supplier-carriers as holders of "executory contracts" with interconnecting carriers, of the Bankruptcy Code's "cure" provisions whereby pre-petition services remaining unpaid at the time of a bankruptcy filing must first be paid ("cured") by a defaulting interconnecting carrier before that carrier can continue to benefit, post-petition, from its preexisting relationships with ILECs such as Verizon. Finally, the FCC should provide streamlined mechanisms for the orderly transfer of customers and facilities from a liquidating interconnecting carrier to such a carrier that will assume the liquidating carrier's service obligations, facilities and the obligation to "cure" pre-petition defaults of the bankrupt carrier. USTA believes that these proposals best safeguard the continued ability of ILECs to service their local communities in the fashion demanded by federal and state laws. *See* USTA Comments at 8-10.

[7] SBC Order at 4.

the current tariff – before refusing to process orders or discontinuing service.[10] "Similarly, if a customer fails to pay a deposit or prepayment within 21 days of the date the notice is sent, SBC may refuse to process orders or may terminate service 11 days after the original deposit or prepayment due date."[11]

USTA fully supports SBC's justifications for Transmittal Nos. 1312, 20, 77, 772, and 2906, as set forth in the Direct Case. USTA believes that now more than ever ensuring continuity of service by limiting the financial fallout from companies facing bankruptcy is of utmost importance. This is particularly challenging because not only must companies such as SBC find ways to continue delivering service to customers of bankrupt carriers, they must find ways to do so without being dragged down with financially-troubled carriers.

USTA believes that the FCC should not permit the troubles of failing carriers to be inflicted on the entire industry or any particular providing carrier. SBC and other ILECs cannot afford to absorb hundreds of millions of dollars of costs each month providing service to companies that cannot pay for service. Unlike carriers that have the option to refuse to provide service, ILECs are required by law to provide service upon demand. If forced to provide service to bankrupt or uncreditworthy customers without being permitted to implement reasonable measures to protect against the risk of nonpayment, the financial health of ILECs as well as their ability to serve customers will suffer enormously.

Those filing the Oppositions disingenuously respond to SBC's proposals to protect itself from the risk of bad debt by stating that SBC faces no increased risk. AT&T, for example, says SBC's proposals are in response to "a largely nonexistent problem."[12] USTA disagrees with

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[8] *Id.*
[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] AT&T Opposition at 2.

AT&T and wonders whether AT&T has turned a blind eye towards the industry. USTA believes that the problems in the telecommunications industry are real and have not dissipated.

USTA agrees with SBC that there has been a "significant and permanent change in the market" that should not be characterized as a normal market fluctuation.[13] Many industry experts continue to foresee a downturn in the telecommunications industry for quite some time come.[14] For instance, speculation still surrounds Qwest's ability to avoid bankruptcy,[15] and many analysts continue to advise investors that other major companies may be at risk of bankruptcy in the months ahead. In addition, industry analysts are referring to the necessity of "emergency measures" at Lucent, once the leading telecom researcher and a showplace for American innovation.[16] USTA urges the FCC to recognize that it would be a serious miscalculation to force healthy carriers, including SBC, to suffer financial hardship in an attempt to salvage bankrupt or financially unstable carriers.

Moreover, the full impact of Global Crossing's and MCI/WorldCom's bankruptcy has not been felt and likely will not be felt for some time. In September, Global Crossing proposed a plan of reorganization offering its telecom creditors less than a third of their prepetition claims. Global Crossing's plan has yet to be approved by the Bankruptcy Court, and there is no assurance that it will be effected even if approved.[17] MCI/WorldCom is even earlier in its bankruptcy case, just recently having pushed off the date for proposing a reorganization plan another five months.[18]

[13] SBC Direct Case at 7.
[14] *Id*.
[15] *See* "Understanding the Risks and Responses to Vendor Bankruptcy," Phone + (Oct. 2002); http://www.phoneplusmag.com/articles/2A1TAG.html).
[16] "Can Lucent Find the Light?" *E-Commerce News*, (10/25/2002).
[17] *In re* Global Crossing Ltd., et al., Bankr. No. 02-40188, DE 1754 (Bankr.S.D.N.Y 9/16/02)
[18] *In re* WorldCom, Inc., Bankr.No. 02-13533, DE 1999 (Bankr.S.D.N.Y. 11/15/02).

USTA believes that SBC must be able to protect its ability to obtain payment for services it is legally required to provide to failing companies. AT&T opposes the FCC's approval of Transmittal Nos. 1312, 20, 77, 772, and 2906, asserting that requiring a security deposit or advance payment is unjust, unreasonable and discriminatory.[19] Many of those filing Oppositions, questioned SBC's motives and declared that the suggested tariff revisions are not aimed at deadbeat or bankrupt customers at all but at SBC's competitors.[20] AT&T contends that " [G]iven the grossly excessive returns that SBC and other large incumbent LECs achieve on access services, SBC's plea for additional security is simply thinly disguised greed – and a stark effort to gain an anticompetitive weapon . . .."[21] USTA strongly disagrees with all of these assertions.

In general, those filing Oppositions have found fault with every trigger for deposit or advance payment proposed by SBC because they want SBC to shoulder all of the risk of lost payments in the wake of bankruptcy filings. None of the companies filing Oppositions offers constructive suggestions for alternative triggers for requiring advance payments or deposits or other protections. They merely belittle SBC's concerns and indulge in inflammatory RBOC-bashing. For example, AT&T claims that there is no need for the Commission to take additional steps to help SBC maximize its access revenues because of the hefty margins on services that SBC continues to enjoy.[22] AT&T completely discounts SBC's dramatic increase in uncollectible levels over the past two years, and the fact that SBC is currently a party to 53 different bankruptcy proceedings.[23]

[19] AT&T Opposition at 39.
[20] *See, e.g.*, Association for Local Telecommunications Services (ALTS) Opposition at 2.
[21] AT&T Opposition at 2.
[22] AT&T Opposition at 2.
[23] SBC Direct Case at 2, 6.

USTA agrees with SBC's impaired creditworthiness criteria as a valid predictor of whether a customer will pay its interstate access bill. Many opponents in this proceeding have rejected SBC's impaired creditworthiness criteria because a substantial number of carriers have experienced downgrades in their investment ratings because of the current crisis in the telecommunications industry.[24] USTA believes that this is a reality that telecommunications carriers must accept in order to do business in these uncertain economic times within the industry. We agree with SBC's assertion that once "a company's credit worsens, its risk of default rises."[25] Thus, SBC is correct in its assertion that the current telecommunications "economic crisis will continue to create a significant risk of non-payment that SBC must address."[26]

Financial institutions rely on the creditworthiness of the borrower in order to set interest rates and to determine whether credit will even be issued. Unlike a financial institution, SBC is required to provide access to its networks under the Communications Act of 1934, as amended.[27] Because of this inequity, we believe that SBC's impaired creditworthiness criteria is a sound business practice that will protect SBC from future losses from customers whose current credit worthiness is in question via deposits.

Moreover, USTA supports SBC's proposed one-month security deposit and prepayment provision for customers with impaired credit and who fit the proposed one million-dollar threshold. We agree with SBC's objective criteria for developing credit requirements based on third party sources, e.g., Standard and Poor's. In addition, USTA believes that it is reasonable to classify customers without a history of late payments as credit risks on the basis of third-party

[24] *See generally* Oppositions of ALTS, AT&T, and Sprint.
[25] SBC Direct Case at 21.
[26] SBC Direct Case at 19.
[27] 47 U.S.C. *et seq*.

investment ratings. Neither WorldCom nor Global Crossing had a history of late payments with ILECs; however, after their securities were downgraded both companies defaulted.

USTA disagrees with those filing oppositions that SBC's proposed bankruptcy impaired credit criteria conflicts with the U.S. Bankruptcy Code. USTA believes that the protection SBC seeks is lawful under section 366 of the Bankruptcy Code. SBC is merely asking the FCC to exercise its ratemaking authority to require a deposit when a customer has filed for bankruptcy. Under section 366 of the Bankruptcy Code, a utility may seek "adequate assurance of payment of service provided after the date of the petition." For SBC and other ILECs "adequate assurance" means either a deposit or other security. We believe that SBC correctly states that:

> Bankruptcy courts have held that utilities have the right to initially set the amount for adequate assurance of payment, and further that utilities have the right to the deposit demanded "unless the debtor can show cause to reduce it."[28] While the bankruptcy court certainly is the final arbiter of what constitutes "adequate assurance of payment," nothing precludes utilities such as SBC from establishing tariff terms allowing for the collection of deposits from customers that have filed for bankruptcy.[29]

Whether deposits could be looked on as a "preference" in the 90-day window preceding an interconnecting carrier's bankruptcy remains an open question. At some point in bankruptcy reorganization, the debtor looks for payments made on pre-petition debts in the 90 days preceding the bankruptcy filing. If it appears, for whatever reason, that a particular creditor received more than would have been normal given the payment history, that amount can be recovered for the debtor's estate to further fund its plan of reorganization. However, since there is an exception to preferences for payments made in the ordinary course of business, USTA contends that any payment or deposit made pursuant to a filed tariff would be *a fortiori* escape preference recaptured as an "ordinary course of business" payment.

[28] *In re Best Products*, 203 B.R. 51, 54 (E.D. Va. 1996).
[29] SBC Direct Case at 17.

Finally, USTA does not believe that the full extent of the bankruptcy crisis is evident in SBC's financials. WorldCom, for example, did not declare bankruptcy until July 2002. SBC's proposed tariff changes are designed to protect it from a new threat, one not seen in its figures for 2001 or accounted for in any company's business plan, including SBC's. SBC should not be forced to be the guarantor of WorldCom's or any other company's bad debt. It should be entitled to take steps to reduce the risk of nonpayment, thereby ensuring its own viability and that of the telecommunications industry in general.

In order to ensure SBC's continued ability to serve its local communities as required by law and for the other reasons stated above, USTA asks the FCC to act expeditiously to approve SBC's Transmittal Nos. 1312, 20, 77, 772, and 2906. Even if the FCC does not approve the specific triggers for requiring security deposits and advance payments proposed by SBC in Transmittal Nos. 1312, 20, 77, 772, and 2906, it nonetheless must recognize that ILECs need commercially reasonable means to insulate themselves from the heretofore unimagined and unprecedented financial turmoil in the telecommunications industry.

Respectfully submitted,

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